

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-827**

DONALD J. WILSON, SR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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December 9, 1977

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IN THE
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OCTOBER TERM, 1977

No.

DONALD J. WILSON, SR., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Petitioner, Donald J. Wilson, Sr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The Judgment Orders of the United States Court of Appeals affirming petitioner's conviction and denying the petition for rehearing are not reported. The Judgment Orders which did not have written opinions are appended to this petition.

JURISDICTION

The Judgment Order of the Court of Appeals was entered on October 4, 1977. The Judgment Order denying the petition for rehearing was entered on November 9, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's failure to instruct the jury on all essential elements of the alleged offenses was in contravention of petitioner's Constitutional right to trial by jury?

2. Whether the trial court's partial direction of a verdict against petitioner was in derogation of his Constitutional right to trial by jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, Section 2, Clause 3 of the United States Constitution provides, in part, as follows:

Article III, Section 2, Clause 3—

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said crimes have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Sixth Amendment to the Constitution provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 26, Section 7201 of the United States Code provides as follows:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26, Section 7206(1) provides, in part, as follows:

Any person who—

(1) *Declaration under penalties of perjury.* Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with costs of prosecution.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in the United States District Court for the Western District of Pennsylvania for three counts of willfully attempting to evade income taxes for the taxable years 1970, 1971 and 1972 in violation of 26 U.S.C. § 7201. Additionally, petitioner was convicted for three counts of willfully making and subscribing to corporate income tax returns of Mercer Tire Company for the taxable years ending March 31, 1970, 1971, and 1972, which returns were verified by a written declaration that they were made under the penalties of perjury, and which returns petitioner did not believe to be true and correct as to every material matter in violation of 26 U.S.C. § 7206(1).

Petitioner appealed the above-described convictions to the United States Court of Appeals for the Third Circuit. In his appeal, petitioner raised numerous assignments of error. The Court of Appeals, without the benefit of oral argument, affirmed the convictions. A written opinion was not included in the Court of Appeal's Judgment Order.

Petitioner timely filed a petition for rehearing with the Court of Appeals. The petition for rehearing was denied by the Court on November 9, 1977.

Most of the specific facts in this case are uncontradicted. During the years in issue, the petitioner Donald J. Wilson, Sr., was the principal shareholder and president of Mercer Tire Company. During the years in issue, Mercer Tire Company was engaged in the business of selling tires and other automobile products at both wholesale and retail. Additionally, Mercer Tire Company was engaged in the process of manufacturing recapped tires for ultimate sale to customers.

As a part of the conduct of its recapping operations, Mercer Tire Company found it necessary to purchase tire casings from various sources. One of these sources was J&M Tires of Buffalo, New York. It was agreed by Morris Mankoff of J&M Tires and Donald J. Wilson, Sr., on behalf of Mercer Tire Company, that certain amounts would be returned in cash to Donald J. Wilson, Sr. from the purchase by Mercer Tire Company of tire casings from J&M Tires. At trial, Morris Mankoff and petitioner disagreed regarding the actual amounts returned by J&M Tires during the years in issue. Morris Mankoff and the government claimed the amount of approximately \$25,000 was returned to and received by Donald J. Wilson, Sr. Petitioner testified and admitted that he received, on behalf of Mercer Tire Company, the approximate amount of \$8,045 from J&M Tires. Petitioner characterized these payments as constituting freight allowances. These freight allowances, which petitioner claimed were common in the tire industry, represented a reimbursement to purchasers for their costs in providing their own transportation in connection with the purchase of tire casings. Petitioner computed the amount returned on the basis of 15% of each invoice.

Petitioner also admitted cashing four Firestone Tire and Rubber Company checks which represented bonuses to Mercer Tire Company for its sale of Firestone products in excess of certain quotas. These four checks represented approximately \$10,000 in bonus payments.

None of the amounts which petitioner admitted receiving were reflected on the Mercer Tire Company books and records nor on his personal tax returns. Petitioner explained that he used the funds to buy certain motor and recreational vehicles for Mercer Tire Com-

pany. According to petitioner, these vehicles were intended for and were ultimately used by Mercer Tire Company in the normal course of its business affairs.

The government alleged that underpayments in tax by both Mercer Tire Company and petitioner and his spouse resulted from the receipt and subsequent non-reporting of the amounts received by Donald J. Wilson, Sr. from J&M Tires and Firestone Tire and Rubber Company. The government predicated its theory on the grounds that Mercer Tire Company overstated its cost of goods sold deductions on its corporate tax returns by failing to recognize on said returns the funds received by its agent, Donald J. Wilson, Sr., from J&M Tires and Firestone Tire and Rubber Company. The government also alleged that petitioner diverted these payments for his own personal benefit which diversions constituted taxable income which taxable income was omitted from his individual federal income tax returns.

The government presented its case on the theory that petitioner's admission of receiving any funds from J&M Tires or Firestone Tire and Rubber Company constituted a concession that deficiencies in income taxes existed with respect to both petitioner and his spouse and Mercer Tire Company. The record in this case clearly establishes that the trial judge concurred in the government's assessment of the effects of petitioner's admissions. As a result, the trial judge restricted the jury's consideration of petitioner's guilt or innocence to the sole issue of willfulness on the part of petitioner or the lack thereof.

In its charge to the jury, the court on four separate occasions instructed the jury that the sole issue in the

case was the existence of willfulness on the part of petitioner. In fact, the entire thrust of the jury charge was that any questions relating to the existence of deficiencies in income taxes on the part of both Mercer Tire Company and petitioner were not to be considered and were not in fact issues in this case. The effect of the court's jury charge was to eliminate from the jury's consideration an essential element of the alleged crime; the existence of deficiencies in income taxes. Moreover, the effect of the jury charge was to partially direct a verdict against petitioner in derogation of his Constitutional right to trial by jury.

The Court of Appeals' decision affirming petitioner's convictions is in total conflict with not only its own precedents but also the applicable decisions of this Court. Moreover, the Court of Appeals' decision in this case represents a sanctioning of the lower court's departure from established judicial procedure which departure compels this Court to exercise its power of supervision over the lower federal courts. Without this Court's intervention, petitioner will stand convicted even though his guilt was determined by the trial judge and not the jury.

REASONS FOR GRANTING THE WRIT

Article III, Section 2, Clause 3 of the Constitution provides that the "trial of all crimes, except in cases of impeachment, shall be by jury". Similarly, the Fifth and Sixth Amendments to the Constitution guarantee an accused as a matter of fundamental due process the right to a speedy trial before an impartial jury. The issue in this case is simply whether petitioner was denied his Constitutional right to trial by jury as a re-

sult of the trial court's charge to the jury. Frankly, petitioner believes the law is so clear regarding what constitutes a trial by jury that he cannot comprehend how the Court of Appeals for the Third Circuit could affirm the lower court's convictions. Petitioner believes the lower courts' handling of this case are so contrary to fundamental concepts of due process as to compel the issuance of a writ of certiorari. Moreover, this Court's failure to issue such a writ will only serve to further sanction the trial court's radical departure from the accepted and usual course of judicial proceedings. Accordingly, petitioner urges this honorable Court to exercise its power of supervision over inferior federal courts in order to preserve the very Constitutional guarantees afforded all criminal defendants.

The traditional role of judge and jury is that the jury is the finder of fact while the judge determines the law. To assist the jury in its fact finding process, it is necessary for the trial judge to instruct the jury regarding the applicable law. It then becomes the jury's function to apply the determined facts to the law. The ultimate fact for the jury's determination is, of course, the guilt or innocence of the accused.

Since the government bears the burden of proving beyond a reasonable doubt each and every element of the alleged offense, it is essential that the trial judge give the jury adequate instructions regarding these necessary elements. Without the benefit of adequate and complete instructions, a jury cannot be expected to fulfill its duty.

The judiciary recognized long ago that the mere impanelling of a jury did not, per se, guarantee the accused the right to trial by jury. It has been ever mind-

ful that the traditional relationship and balance of judge and jury be preserved at all costs. Accordingly, a long line of legal precedents exist within the federal system regarding the proper procedures to be utilized to ensure the preservation of the right to trial by jury.

In *Screws v. United States*, 325 U.S. 91 (1945), this Court reversed a conviction on the grounds that the trial court had failed to instruct the jury on all essential elements of the case. In fact, this Court deemed the error so fundamental that it took note of it upon its own motion. Furthermore, the Court of Appeals for the Third Circuit also recognizes the efficacy of this concept. As early as 1946, the Third Circuit issued a series of opinions which held that a trial court must instruct the jury on each and every essential element of an alleged offense. See, *United States v. Levy*, 153 F.2d 995 (3rd Cir. 1946); *United States v. Noble*, 155 F.2d 315 (3rd Cir. 1946); *United States v. Max*, 156 F.2d 13 (3rd Cir. 1946). In fact, petitioner submits that the entire federal court system recognizes that this type of jury instruction is necessary if the Constitutional guarantee of a right to trial by jury is to be preserved.

Furthermore, this Court and the Third Circuit in recognition of a defendant's rights accorded him by the Fifth and Sixth Amendments to the Constitution have never waived in their insistence that fundamental fairness and due process require that a duly constituted jury and not the trial judge should decide the guilt or innocence of the accused. Accordingly, where a trial judge takes from the jury an essential question of fact or element of the case, the conviction has been deemed so tainted as to require reversal. See, *United Brotherhood of Carpenters and Joiners v. United States*, 330

U.S. 395, 410; *Bollenbach v. United States*, 326 U.S. 607 (1946); *United States v. Manuszak*, 234 F.2d 421 (3rd Cir. 1956); *United States v. Gollin*, 166 F.2d 123 (3rd Cir. 1948) cert. denied, 333 U.S. 875.

Petitioner believes both this Court's and the Third Circuit's precedents regarding the need for proper jury instructions on all essential elements of an alleged offense to be so clear and unmistakable that the Appellate Court's holding herein could only be grounded upon the erroneous conclusion that either petitioner conceded an essential element or the trial judge gave a proper and thorough instruction. Since petitioner believes the record in this case does not support either of such conclusions, he urges this Court to fully review this matter. Petitioner believes that upon such consideration, this Court will concur with him that plain and fundamental error was committed by the trial judge; which error compels reversal of the convictions. If this Court does not hear this case, the trial court's radical departure from established procedure will go unchecked.

Petitioner was indicted and convicted on three counts of personal income tax evasion. 26 U.S.C. § 7201. To sustain a conviction under the aforementioned section, the government must prove the following elements beyond a reasonable doubt: (1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of tax. *Sansone v. United States*, 380 U.S. 343 (1965). The touchstone to any successful prosecution for tax evasion is the existence of a deficiency in income tax. *Spies v. United States*, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943); *Lawn v. United States*, 355 U.S. 339, 361,

78 S.Ct. 311, 2 L.Ed 2d 321 (1958); *United States v. Knox Coal Co.*, 347 F.2d 33 (3rd Cir. 1965).

Donald J. Wilson, Sr. entered a plea of not guilty to all of the charges for which he was indicted. In the absence of a clear and unmistakable concession of any of the essential elements of the alleged crimes, the government continued to bear the burden of proving each of the essential elements beyond a reasonable doubt. Moreover, it remained the jury's duty to determine if the government had met its evidentiary burden by applying the facts of the case to the applicable law. Petitioner believes the jury was usurped of its proper function by the trial court's resolution and taking from the jury of an essential element of the case.

Petitioner believes the record in this case is clear that the government treated this case as another in a long line of simple diversion situations involving a closely held corporation and its officer/shareholder. *Cf.*, *United States v. Goldberg*, 330 F.2d 30 (3rd Cir. 1964), cert. denied, 377 U.S. 953, 84 S.Ct. 1630, 12 L.Ed. 2d 497; *Davis v. United States*, 226 F.2d 329 (6th Cir. 1955), cert. denied, 350 U.S. 963, 76 S.Ct. 632, 100 L.Ed. 838; *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976), cert. filed, 12/10/76. As a simple diversion case, the government apparently believed there could be no dispute that the necessary deficiencies in income taxes existed. The government was so certain of this view that it never even bothered to request an instruction on the existence of a deficiency in income tax despite the fact it knew this to be an essential element of the alleged offense for which it bore the burden of proof.

The trial court in its charge to the jury also fell prey to this limited issue theme when it instructed the jury

on four separate occasions that the sole issue for its consideration was the existence of willfulness on the part of the petitioner. That the jury may have recognized that other issues remained for its consideration is idle speculation and highly doubtful.

In answer to petitioner's assignment of errors on appeal, the government attempted to seek comfort in petitioner's testimony and his trial counsel's statements. The government argued the combination of these two resulted in a concession regarding the existence of a tax deficiency; an essential element of the case. Unfortunately, for the government, petitioner's admission that he received the funds in question did not establish a deficiency in income tax in either law or fact. Although petitioner and his counsel acknowledged some taxes were owing by either petitioner or Mercer Tire Company *or perhaps both*, such an admission could not and did not relieve the government of its evidentiary burden. It remained the government's burden to establish that petitioner while acting on behalf of Mercer Tire Company received the questioned funds and then subsequently diverted them for his own personal use, benefit and enjoyment. Petitioner testified that he received and expended the funds on behalf of Mercer Tire Company. If his testimony was believed by the jury, it could not find him guilty of personal income tax evasion. Without a corporate diversion, the government could not prove that petitioner had taxable income which was omitted from his return and for which no federal income taxes were paid.

Although the capacity in which petitioner was acting when he admittedly received and expended the questioned funds might appear at first blush to be a

subtle distinction created by overly complex tax laws, this technical tax distinction was injected into the case when the government sought an indictment and ultimately prosecuted petitioner for actions occurring in both his capacities as an officer/shareholder of Mercer Tire Company and as an individual citizen taxpayer. Having injected technical tax considerations into its prosecution of petitioner, the government should not be permitted to hide behind an admission of mere receipt of funds by petitioner as a concession of an essential element of the alleged offenses. No matter how logically appealing it may at first blush appear, mere receipt does not constitute diversion and necessitate recognition of taxable income. Petitioner offered a plausible defense to the recognition of taxable income component and the consequent underpayment of taxes component. Absent a concession, the government's burden with respect to establishing tax deficiencies owing by petitioner and his spouse remained. Moreover, it was the trial court's duty to instruct the jury on this essential element.

Petitioner believes the record in this case clearly establishes that the trial court limited the jury's consideration of his guilt or innocence to whether it believed his actions were willful. Moreover, even if the jury was given some general instructions regarding other essential elements of the alleged offenses, those instructions were not only insufficient as a matter of law but meaningless since the jury must have understood its deliberations were limited to one sole issue, willfulness. Any suggestion to the contrary is illusory when read in light of the record.

Defendant believes the record herein clearly establishes that the trial court failed to instruct the jury

on each and every element of the alleged 26 U.S.C. § 7201 offense, and that the effect of the charge resulted in a partial direction of the verdict against defendant in derogation of his Constitutional right to trial by jury. The Court of Appeal's affirmance of the convictions does violence to the very Constitutional guarantees afforded all criminal defendants by this Court's prior holdings in *Screws, supra*; *United Brotherhood of Carpenters and Joiners, supra*; *Bollenbach, supra*. Defendant believes that only after a thorough and complete review of this cause will due process of law be realized. Moreover, in the absence of review by this Court, petitioner's convictions will stand despite the fact that he was denied trial by jury.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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December 9, 1977

ADDENDUM

1a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1275

UNITED STATES OF AMERICA

v.

WILSON, DONALD J., SR., *Appellant*

(D.C. Crim. No. 76-192)

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS,
ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: November 10, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1275

UNITED STATES OF AMERICA

vs.

WILSON, DONALD J., SR., *Appellant*

(D.C. Crim. No. 76-192)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
October 3, 1977

Before GIBBONS and WEIS, *Circuit Judges*, and
MEANOR,* *District Judge*

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Judgment Order

Donald J. Wilson, Sr., appeals from a judgment of sentence following conviction on three counts of income tax evasion, 26 U.S.C. § 7201, and three counts of filing false corporate income tax returns, 26 U.S.C. § 7206(1). He contends:

1. That the District Court erred in failing to charge on all essential elements of the § 7201 offense;
2. That the District Court erred in directing a partial verdict against him;
3. That the District Court failed to instruct the jury on a defense theory of the case;
4. That the charge, overall, favored the prosecution;
5. That the District Court erred in excluding the testimony of certain defense witnesses;
6. That the District Court abused its discretion in failing to order the reading to the jury of the entire testimony of Joseph L. Wilson, Jr.;
7. That the defendant was denied the effective assistance of counsel.

We find no merit in any of these contentions.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court,

/s/ JOHN J. GIBBONS
John J. Gibbons
Circuit Judge

Attest

/s/ THOMAS F. QUINN
Thomas F. Quinn, Clerk

Dated: October 4, 1977

No. 77-827

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**ON PETITION FOR A WRIT OF CERTIORARI TO
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**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

**WADE H. MCCREE, JR.,
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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
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THE THIRD CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner seeks review of his convictions for tax evasion and filing false corporate returns on the grounds that the trial court erred in failing to instruct that no verdict of guilty could be returned without proof of a substantial tax deficiency and in instructing the jury that the only issue for it to decide was that of willfulness.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on three counts of willfully attempting to evade his individual income taxes for 1970, 1971 and 1972, in violation of 26 U.S.C. 7201, and on three counts of making and subscribing false corporate income tax returns for the Mercer Tire Co. for the taxable years ending March 31, 1970, 1971 and 1972, in violation of 26

U.S.C. 7206(1). The district court sentenced him to one year in prison on a tax evasion count and suspended sentence on the remaining counts. It also imposed fines totaling \$21,000 (P.A. A-1 to A-3).¹ The court of appeals affirmed (Pet. App. 2a-3a).

The evidence showed that petitioner, who was president and owner of the Mercer Tire Company, diverted money to himself from the corporation over a period of years. The diverted funds amounted to approximately \$24,000 returned to petitioner by a tire casing supplier, who accepted checks of the corporation drawn in excess of the purchase price and returned the difference in cash to petitioner. Petitioner kept the cash and did not account for it on the corporate books. There were also a number of bonus checks for volume purchases made payable to the corporation by Firestone Tire & Rubber Co., which petitioner diverted from the corporation, cashed, and did not account for on the corporate books. Petitioner's diversion of the cash and checks resulted in an overstatement of the cost of goods sold on the corporate tax returns and understatement of income. Moreover, petitioner did not report the funds he diverted on his personal income tax returns (Tr. 18-26, 57-62, 149-161, 165, 170-184, 242-243; Gov't Exh. 107). The total unreported taxable income received by petitioner during the three prosecution years was in excess of \$34,000; the corporation's gross profit was understated during the three corresponding taxable years by more than \$33,000 (Tr. 238-241; Gov't Exh. 107).

¹"P.A." refers to the Appendix filed by petitioner in the court of appeals. "G.A." refers to the Appendix filed by the government in the court of appeals. "Tr." refers to the trial transcript.

1. Petitioner contends (Pet. 7-14) that the trial court erred in failing to instruct that no verdict of guilty could be returned without proof of a substantial tax deficiency.² But petitioner did not advance this argument at the time the charge was given, as required by Rule 30, Fed. R. Crim. P. Indeed, when, out of an abundance of caution, the prosecutor suggested to the court (after the charge was given) that "* * * it's a requirement, of course, that they find a tax deficiency in order to find evasion" (P.A. A-100; Tr. 459), petitioner's counsel clearly indicated that he was satisfied with that aspect of the charge³ and promptly went on to another point (P.A. A-100 to A-101; Tr. 459-460). Since he expressly advised the court that he was satisfied with this portion of the charge, petitioner cannot now complain that the charge was erroneous. *Johnson v. United States*, 318 U.S. 189, 200-201.

At all events, the trial court did instruct the jury that there had to be a substantial tax deficiency. After the prosecutor raised the point with the court, the court instructed the jury that it was not their "function to find that there was a sum in a specific amount, as long as there was just some substantial evasion of taxes" (P.A. A-101).

²This contention goes only to the propriety of the convictions on the three evasion counts and has no bearing on the three counts relating to false corporate returns. It is well settled that the existence of a tax deficiency is not an essential element under 26 U.S.C. 7206(1). *Schepps v. United States*, 395 F. 2d 749 (C.A. 5), certiorari denied, 393 U.S. 925; *Siravo v. United States*, 377 F. 2d 469 (C.A. 1); *Silverstein v. United States*, 377 F. 2d 269 (C.A. 1); *Hoover v. United States*, 358 F. 2d 87 (C.A. 5), certiorari denied, 385 U.S. 822.

³Defense counsel replied to the prosecutor's suggestion in these words (P.A. A-100; Tr. 459):

Well, Your Honor, Your Honor had referred to "there were no particular amounts, as long as it was substantial", several times.

2. Contrary to petitioner's further argument, the trial court correctly charged the jury that the only issue the jury had to decide was that of willfulness or intent (P.A. A-79, A-85, A-89). Petitioner conceded at trial that the tire casing supplier returned some \$8,000 to him, that he also received some \$18,000 in diverted Firestone checks, that these amounts were not recorded on the corporate books, and that there were additional taxes due and owing (G.A. 2b, 20b; Tr. 275, 302-305, 317, 341-356).⁴ Petitioner's sole defense, as stated in his opening and closing arguments, was lack of willfulness (G.A. 1b-35b). Once petitioner conceded that there was a tax deficiency, the trial court correctly charged the jury that the only issue before it was that of willfulness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.

⁴In his opening statement to the jury at the close of the government's case, petitioner's counsel stated, "Now there is no question that there is some money owed the United States government here * * * there is no question that the corporation, or Mr. Wilson, or perhaps both of them, owe some tax" (P.A. A-39; Tr. 275).

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REPLY BRIEF FOR PETITIONER

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February, 1978.

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v.
UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Third Circuit

REPLY BRIEF FOR PETITIONER

In its Memorandum in Opposition, the United States advances two contradictory arguments. First, it argues the trial court sufficiently instructed the jury regarding the necessity of finding deficiencies in income taxes owing by both petitioner and Mercer Tire Company. Although contradictory to its first argument, the government claims in Argument 2 "that the trial court correctly charged the jury that the only issue the jury

had to decide was that of willfulness or intent." (G.M. 4).¹ Obviously, the government's admission that the jury instruction was limited to a sole issue is in total contradiction to its earlier claim that the court properly instructed the jury on all issues including the necessity of finding tax deficiencies owing by petitioner and Mercer Tire Company.

Although petitioner assumes the government intended to present these as alternative positions, such a distinction is irrelevant since neither argument is supported by the record of this case. Petitioner believes the record and existing law clearly establish that an admission of mere receipt of funds by an individual does not constitute a concession that taxes are owing. Moreover, petitioner believes the trial judge's last minute attempt to cure a clearly defective charge was a meaningless and ineffective gesture since the jury obviously understood its inquiry to be limited to the sole question of willfulness.

In its Memorandum in Opposition, the government repeats its all too familiar theme that petitioner and his trial counsel conceded the existence of the requisite federal income tax deficiencies. As petitioner has argued on appeal, the government apparently treated this as another simple diversion of income situation involving a closely held corporation and its officer/shareholder. As a simple diversion case, the government believed there could be no meaningful dispute that the necessary deficiencies in income taxes existed. The government was so certain of this view that it

¹ "G.M." refers to Memorandum For The United States In Opposition. "P.A." refers to Appendix filed by the petitioner in the court of appeals. "Tr." refers to the trial transcript.

never even bothered to request an instruction on the existence of a deficiency in income tax despite the fact it knew this to be an essential element of the alleged offense for which it bore the burden of proof. (P.A. 4-6).

Moreover, the government alleges that petitioner's admission of receiving funds coupled with his trial counsel's acknowledgement that some taxes were owing (by petitioner or Mercer Tire Company or *perhaps* both) constituted a concession of the tax deficiency element of the alleged crime. Unfortunately for the government, petitioner's admission that he received the funds in question did not establish a deficiency in income tax in either law or fact. Furthermore, no concession of this necessary element was intended. It remained the government's burden to establish that petitioner while acting on behalf of Mercer Tire received the questioned funds and then subsequently diverted them for his own personal use, benefit and enjoyment. Petitioner testified that he received and expended the funds on behalf of Mercer Tire Company. (P.A. 47-65). If his testimony was believed by the jury, it could not find him guilty of personal income tax evasion. Without a corporate diversion, the government could not prove that petitioner had taxable income which was omitted from his tax return and for which no federal income taxes were paid.

Although the capacity in which petitioner was acting when he admittedly received and expended the questioned funds might appear at first blush to be a subtle distinction created by overly complex tax laws, this technical tax distinction was injected into the case when the government sought an indictment and ulti-

mately prosecuted petitioner for actions occurring in both his capacities as an officer/shareholder of Mercer Tire Company and as an individual citizen taxpayer. Having injected technical tax considerations into its prosecution of petitioner, the government should not be permitted to hide behind an admission of mere receipt of funds by petitioner as a concession of an essential element of the alleged offenses. No matter how logically appealing it may at first blush appear, mere receipt does not constitute diversion and necessitate recognition of taxable income. Petitioner offered a plausible defense to the recognition of taxable income component and the consequent underpayment of tax component of the personal tax evasion offense. Absent a concession, the government's burden with respect to establishing tax deficiencies owing by petitioner and his spouse remained. Moreover, it remained the trial court's duty to instruct the jury on this essential element.

Petitioner believes the record in this case clearly establishes that the trial court limited the jury's consideration of petitioner's guilt or innocence to whether it believed his actions were willful. On four separate occasions during the primary charge, the court instructed the jury that the sole issue for its consideration was the existence of willfulness or the lack thereof. (P.A. 79, 85, 87, 88, 89). It was only after objections to the primary charge were considered, that the court instructed the jury regarding the necessity of finding some substantial evasion of taxes. (P.A. 101-102). This last minute attempt to cure the charge, however, was ineffective for a number of reasons. First, the court failed to instruct the jury regarding what constituted taxable income or how the necessary

underpayment of tax could be determined. Second, the court failed to instruct the jury regarding the necessity of finding a diversion of funds by petitioner from Mercer Tire Company. Finally, both before and after the reference to the necessity of finding a deficiency, the court told the jury how the government expert's testimony established the necessary tax deficiencies. The clear implication of these statements was that although necessary, the deficiencies in income tax could be presumed.

Petitioner contends that the court's last minute attempt to instruct on the necessary element was a useless and ineffective gesture since the clear and unequivocal thrust of the jury charge as a whole was the uncontested existence of the necessary tax deficiencies. It is clear that the government presented this case on a single issue theory. Moreover, it is equally clear that the trial judge also fell prey to the limited issue theme and instructed the jury accordingly. Petitioner submits that it is unmistakably clear that the jury understood its deliberations to be limited to the sole issue of willfulness. Any suggestion to the contrary is illusory when read in light of the record.

Petitioner recognizes that his trial counsel contributed to the confusion surrounding the issues at trial.^{*} However, petitioner urges this Court not to impute his trial counsel's errors to him. Petitioner believes that the trial court's failure to instruct on all essential elements of the alleged offense to be so funda-

^{*} On appeal, petitioner assigned as error the ineffective assistance of his trial counsel. Subsequent to the trial, petitioner discharged his trial counsel.

mental as to constitute plain error requiring reversal. *Screws v. United States*, 325 U.S. 91 (1945).

The government's allegations that petitioner conceded an essential element of the case and the sufficiency of the jury instruction is not supported by the record. The record does support petitioner's contention that he was denied the right to trial by jury due to the trial court's failure to charge on all essential elements of the charged offenses which resulted in a partial direction of the verdict against petitioner.

CONCLUSIONS

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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